It follows from what I have said before that there is on the evidence accepted by the court, no more than strong suspicion against the accused. The case against him has not been proved and he is acquitted on the charge against him.

Accused acquitted.

RATNA AMMAL & ANOR. v. TAN CHOW SOO

[F.C. (Thomson L.P., Wylie C.J. (Borneo) and Tan Ah Tah F.J.) April 28, 1964]

[Penang — Federal Court Civil Appeal No. 96 of 1963]

Partnership — Whether agreement constitutes a partnership — Partnership property — Whether property rights in trade mark vested in partnership or in partner alone — Partnership Act, 1890 ss. 20 and 21.

Trade Marks — Property in — Partnership — Trade Marks Ordinance, 1950, ss. 38, 52 and 54.

The parties in this case had entered into an agreement to form a so-called syndicate for the purpose of selling condensed milk, the relationship thus constituted being essentially a partnership. The respondent had obtained registration of a trade mark in respect of milk and other dairy products. The question was whether the property rights in the trade mark were vested in the partnership or were to remain vested in the respondent alone.

Held: it was clear from the terms of the written agreement between the parties that the property rights in the trade mark were to be remain vested in the respondent.

Decision of Hepworth J., *ante* p. 24, affirmed.

Cases referred to:—

(1) *Adam* v. *Newbigging* (1888) 13 App. Cas. 308 at page 315.

(2) *Weiner* v. *Harris* [1910] 1 K.B. 285 at p. 290.

FEDERAL COURT.

V. K. Palasuntharam for the appellants.

C. O. Lim for the respondent.

Cur. Adv. Vult.

Thomson L.P.: I have had the advantage of reading Sir Campbell Wylie's judgment with which I agree.

The object of the agreement between the parties dated 3rd November, 1961, was to form a so-called syndicate for the purpose of selling condensed milk. The relationship thus constituted between them was no doubt essentially one of partnership. It is, however, well-settled law that persons may be partners in some particular business although all or part of the property used for the purpose of such business may not be the subject of joint-ownership but may belong to some or one of them individually.

The question of whether any particular property is or has become the subject of joint-ownership is a question which has to be decided in each individual case. In the present case I think it is clear from the terms of the written agreement that the property rights in the trade mark *tanta et talia* were to remain vested in the respondent.

Wylie C.J. (Borneo): The appellants proceeded by originating motion in the High Court at Penang for an order under section 46 of the Trade Marks Ordinance, 1950, to have the register of trade marks rectified in one of several different ways in respect of trade mark No. M/36213. At the hearing of the appeal, it became clear that the order which the appellants really sought was an order that both the appellants and the respondent should be entered on the register as the registered proprietors of the trade mark instead of the respondent alone, as is the present position. Having regard to the evidence (which is to the effect that the respondent first acquired the right to use this trade mark, applied for registration and then, before registration was effected, formed with the respondents a syndicate which was to use this trade mark for a certain class of business only) it may be doubtful whether an order to this effect could be made under an application under section 46. See *Kerly* on Trade Marks (eighth edition) at page 202 paragraph (10) and the cases cited in the seventh edition referred to in the footnote. However, the appellants did ask, in the alternative, for an order expunging the registration entirely, and, in the view that I take of the appellants' claim, the point becomes immaterial. The respondent has not raised it and both parties obviously wish the court to determine their differences concerning this trade mark in these proceedings.

Affidavits were sworn by the appellants and the respondent. None of the deponents were cross-examined and the only evidence is that contained in these affidavits, together with certain documentary exhibits. This court was informed that the Registrar has had notice of the proceedings, but has not appeared. The High Court refused to make any order for rectification and the appellants have appealed from that decision.

There is little dispute as to the facts. These disclose that the respondent has since September 1959 been importing and selling sweetened condensed milk (referred to as Saint Brand milk) in tins bearing the trade mark ultimately registered as No. M/36213. On 28th August, 1961, the respondent made formal application for registration of the trade mark in respect of milk and other dairy products. The trade mark was registered on 1st October, 1962, but with effect from the date of the application (28th August, 1961) in accordance with section 29 of the Trade Marks Ordinance, 1950. The registered proprietor is described in the certificate as "Tan Chow Soo trading as Soo Seng."

In October 1961 the appellants and the respondent had discussions concerned with the appellants providing finance for trading in sweetened condensed milk. On 3rd November, 1961, a written agreement was executed providing for the three parties to constitute a "syndicate" to be known as the Maha Syndicate to develop the sale of Saint Brand sweetened condensed milk in the area for which (according to the second recital in the agreement) the respondent had been appointed sole selling agents by the manufacturers in Holland under an agreement made between the respondent and the manufacturers. The appellants were to provide "such sums of money as shall be required to finance the business of the syndicate".

Thereafter, this milk continued to be imported in the trade name of the respondent (Soo Seng & Co.) which name was also on the label as part of the registered trade mark. On three occasions only, according to the affidavit of the respondent, the milk was imported in the name of the Maha Syndicate, because (according to the respondent) at that time certain changes were being made in the parties' banking arrangements. The business was carried on at all relevant times at the respondent's premises at 48, Prangin Road, Penang, which comprised an office and a store, but, at times, also in a rented godown, the rent for which was paid by the syndicate. It does not appear that there was any rent paid by the syndicate for the use of the respondent's premises. The business is still being carried on by the respondent at 48, Prangin Road.

The respondent gave notice to the appellants on 26th April, 1963, purporting to dissolve "the agreement dated 3rd November, 1961" (according to the appellants' affidavit) and there are other proceedings before the High Court to determine the present position of the parties in respect of that agreement. It seems to me that, in the course of those proceedings, questions will arise as to what is, and what is not, partnership property and that all the evidence bearing on that question may be more complete, and more thoroughly tested, than has been the case in these more restricted proceedings. It has become apparent during the hearing of this appeal that the real question to be determined is whether or not, under the arrangements made between the parties, the right to be registered as proprietor of this trade mark became partnership property, so that the appellants and the respondent were entitled to be registered as joint proprietors. However, no objection has been taken by the respondent to the determination of this question in these proceedings before the other proceedings continue and it must be assumed, therefore, that, not only do both parties desire an answer at this stage, but the question is to be determined solely on the evidence on record in these proceedings.

A large part of the grounds of appeal and of the argument addressed to this court concerned the interpretation and application of provisions in the Trade Marks Ordinance, 1950. These provisions concern the mode of obtaining registration, who may be registered as proprietor of a trade mark and how changes can be effected in the register. However, nobody can be registered as proprietor until he first establishes his claim to the trade mark. Accordingly, the first question to be considered is whether the appellants have become jointly entitled with the respondent to this trade mark, and this question is to be answered by determining the effect on the ownership of this trade mark of the agreement executed by the parties on 3rd November, 1961.

At first sight, the parties have entered into partnership, but the agreement, which has been drawn up by an established firm of advocates and solicitors, instead of recording in the usual terms that the parties have agreed to enter into partnership records, in clause 1, that the parties "shall constitute a syndicate" with the object of developing throughout the area for which the respondent was sole selling agent "the sale of the said sweetened condensed milk to be supplied by the said manufacturers under the 'Saint Brand' trade mark, or any other mark which may hereafter be substituted therefor, and generally to carry on the business of import and export merchants." Clause 2 provides that the appellants shall be the "financiers of the syndicate", that the bank accounts shall be opened by the appellants in their own names "ostensibly as principals but in reality as agents for the syndicate", that the appellants will pay into these accounts "such sums of money as shall be required to finance the business of the syndicate" and that only the appellants can sign cheques. All receipts are to be paid into these accounts (clause 3). The business is to be carried on at the premises of the respondent, who is to provide office and storage accommodation, including additional premises "as may from time to time, be mutually agreed upon" (clause 4). The "sales management" is to be carried on by the appellants in consultation with the respondent for which the appellants are to receive $700 a month (clause 5). The syndicate is empowered to appoint sub-agents but not "without the previous written consent" of both the appellants and the respondent (clause 7). By clause 8 all expenses are to be borne by the syndicate. By clause 9 all questions concerning management or dismissal of servants, giving credit and compounding debts are to be decided by the appellants and respondent in consultation.

Clause 10 reads as follows:—

"Neither party shall without the consent of the other:—

(a) Either directly or indirectly engage or be concerned in the sale of any milk other than on behalf of the Syndicate.

(b) Assign mortgage or charge his share in the capital assets or profits of the Syndicate."

Clause 11 provides that the nett profits are to be divided equally and clause 12 provides for annual accounts at the end of each year from the date of the agreement, the accounts to record, *inter alia,* the "stock-in-trade credits property effects debts and liabilities of the business of the syndicate." Upon settlement of the acounts the parties are to be entitled to draw out their share of the profits for the past year. There is no evidence on the record that accounts were drawn up at the end of the first year, i.e. as at 3rd November, 1962. Under clause 13, the syndicate is not to be dissolved earlier than one year from the date of the agreement and, if not dissolved then, is to continue from year to year. If the parties decide to incorporate a limited company, the appellants and the respondent are each to "subscribe and pay for one half of the capital of the company from time to time to be issued". Death of any of the parties is not to dissolve the syndicate (clause 14) and the agreement (sic) is to be registered under the Registration of Businesses Ordinance, 1956 (clause 16).

Notwithstanding the avoidance of any reference in the agreement to a partnership and the use throughout of the word "syndicate", I consider that the arrangement arrived at is in fact a partnership. The parties have not expressly negatived the creation of a partnership and, in my judgment, they have agreed to carry on this business "in common with a view of profit," to quote from section 1(1) of the Partnership Act, 1890. It is true that they have made some arrangements, chiefly in respect of finance, which may be somewhat unusual, but I do not consider that either these provisions, or the language used, operate in all the circumstances of this case, to create some business relationship other than that of partnership. See the observations of the Lord Chancellor in *Adam* v. *Newbigging* [1] and to the same effect remarks by the Master of the Rolls in *Weiner* v. *Harris.*[2] During this appeal both counsel assumed that the rights of the appellants and the respondent must be settled on the basis that there was a partnership and, in my judgment, a partnership was created by the terms of this agreement.

It may be that some inference is to be drawn from the use of the word "syndicate" and the complete omission of any reference to a partnership. It is relevant in this connection to note that the agreement was, in effect, only to run from year to year and that the finances remained under the control of the appellants and the respondent's business premises were not transferred to the syndicate. All these features may suggest that the draftsman had in mind that this arrangement was not of as permanent a nature as the usual business partnership and that he was endeavouring, so far as possible, to preserve the parties in their relevant positions immediately before the execution of the agreement in regard to the various assets. Whether that is so or not, the relationship that was created was, in my judgment, that of partnership. It is obvious that, if the partnership is dissolved, some serious questions are going to arise in interpreting that agreement. In these proceedings, however, the court is concerned only with the right to be registered as proprietor of the trade mark and it is clearly desirable, in the state of the evidence in these proceedings and having regard to the existence of other proceedings between the parties, to refrain from expressing views on other aspects, unless that is unavoidable.

The main reference to the trade mark in the agreement is in the first recital, which recites that the respondent "has applied to the Registrars of Trade Marks in Singapore and in the Federation of Malaya for the registration of a trade mark known as the 'Saint Brand' for use in connection with the sale of sweetened condensed milk." The only other reference, apart from that in clause 1 quoted earlier in this judgment, is in the second recital which records that the respondent has entered into an agreement with the Dutch manufacturers of the milk to manufacture and supply it in tins bearing this trade mark. It was argued for the appellants that the first recital, combined with the obvious fact that the business was to sell milk in tins bearing the trade mark, led to the conclusion that this trade mark had become partnership property and was therefore owned by the parties jointly. It was contended that, in the absence of any provision in the agreement to the contrary, section 20(1) of the Partnership Act, 1890, operated to make this trade mark partnership property, and that it should have been registered in the name of the partnership from the outset. At times, the argument also seemed to suggest as an alternative that a term should be implied in the agreement to the effect that the respondent had agreed to assign the trade mark to the partnership.

The conclusion to be drawn from the evidence is that the respondent began to use this trade mark at least as early as in 1959. It is clear, therefore, that the right to use this trade mark was acquired before the partnership was formed and was originally acquired by the respondent alone. He had in fact applied to be registered as the owner of it two months before negotiations

to form the partnership were opened. His application was granted and registration of himself as owner was therefore effective as from the date he applied. So far as section 20(1) is concerned, therefore, the right to use this trade mark cannot have become partnership property as having been acquired on account of the partnership or for its purposes or in the course of the partnership business. The question remains under section 20(1) whether it was "originally brought into the partnership stock" by the respondent.

There is no doubt that, as this partnership was formed to exploit the sale of milk in tins bearing this registered trade mark, the agreement contemplates the use of the mark by the partnership for the sale of sweetened condensed milk. A partnership may make use of the property or rights of a partner without an assignment to the partnership. Clause 4 of this agreement provides an example in respect of the use of the respondent's premises. Moreover, the Trade Marks Ordinance, 1950, section 38 contemplates use of a registered trade mark by other than the registered proprietor and provides a system of registration of users which confers upon the latter rights to use, and to prevent infringement of, such trade marks in respect of all, or (as in this case) some only, of the goods, in respect of which the trade mark is registered. This would not make a user so registered a part owner of the trade mark.

The Ordinance also provides for assignment of trade marks. It is to be noted, however, that this trade mark is registered in respect of milk and other dairy products, whereas the partnership agreement concerns the sale of sweetened condensed milk only, and there is nothing in the agreement to suggest that the parties have agreed that the rights in this trade mark are to become partnership property in respect of all the goods it covers. The omission to provide specifically to this effect, or even in respect of sweetened condensed milk only, is in marked contrast to clauses 2 and 3 of the agreement providing in clear terms for arrangements in regard to finances which provide what may be fairly described as "one hundred per cent protection" for the appellants on that aspect, no doubt because they were to provide all finance required. If, in addition, they were, as partners, to have joint ownership of this trade mark, it is reasonable to expect that the agreement, having been drafted with so careful a consideration for their interests in regard to finance, and again in clause 4, in regard to the respondent having to provide premises for the business apparently free of rent or other charges, would have clearly expressed the agreement for joint ownership of the trade mark. The necessity for this would have been particularly apparent to a solicitor having regard to the provisions of sections 52 and 54 of the Trade Marks Ordinance, 1950, and to the complications caused by the fact that the registration of the trade mark covered goods other than sweetened condensed milk. These considerations have to be viewed in the light of the first recital recording an application *by the respondent alone* for registration of this trade mark, thus establishing beyond all doubt that the draftsman was aware of the existence of this trade mark and that it was about to be registered in the name of the respondent alone.

Having regard to all these considerations, I find it impossible to conclude that a further provision should be implied in this agreement which deals in such detail with the rights of the respective parties in this undertaking and, moreover, that that further provision should, in respect of a subject which is specifically referred to in the recital, be in terms which would produce a result so different from the result which the language of the recital contemplates.

I conclude, therefore, that the agreement does not disclose any intention by the parties that this trade mark was to be registered in the name of, or assigned to, the partnership so as to entitle all parties to be registered as joint proprietors.

This conclusion is consistent also with the tentative view I have expressed earlier that the draftsman may, in the language and form he has chosen, have been endeavouring to avoid some of the results to be expected in a full partnership of a more permanent nature. In these circumstances it may reasonably be expected that the registration of this trade mark, like the ownership of the business premises, might remain with the respondent who had always carried on the business. It is to be observed also that the second recital similarly records that the agreement with the manufacturers is between them and the respondent alone, and there is equally nothing in the agreement which suggests that the partnership is to be made a party to this agreement.

The conclusion I have arrived at is confirmed also by the conduct of the parties. The recital shows that all concerned knew that there was a pending application made in the name of the respondent alone. On 30th June, 1962, according to an exhibit produced by the appellants, an advertisement appeared in the Federation Government *Gazette* calling for notice of opposition to this application to be lodged within two months. The notice shows that the applicant is the respondent alone, trading as Soo Seng. No notice of opposition was lodged, and the partnership traded for nearly eighteen months using this trade mark in the form in which it was registered,

which included the words "imported by Soo Seng & Co. Penang". In addition, paragraph 18 of the respondent's affidavit, which was not contradicted by the appellants, reads as follows:—

"I say that the applicants herein have given me no warning that they would be taking the proceedings herein."

The first challenge to this registration has therefore been brought nearly two years after the agreement was executed and six months after the notice from the respondent purporting to dissolve the agreement. This course of conduct clearly shows acquiescence by the appellants in the registration of the trade mark in the name of the respondent and confirms the conclusion I have arrived at as to the interpretation of the agreement.

I have not overlooked what was referred to as the concessionaire's agreement, which was exhibited. This was an agreement between Maha Syndicate and one Sharikat Enchum Nasution appointing the latter sole distributor of this sweetened condensed milk for the State of Selangor. It is executed by all the partners. In the first recital, the Maha Syndicate is described as "the sole distributors" of sweetened condensed milk marketed under this trade mark, and there are references in the agreement providing for the protection of the trade mark, including an undertaking by the syndicate to "pay for and take all steps necessary" to protect the use of the trade mark. However, there is no direct reference to ownership of the trade mark and I do not consider that these references, for the most part inserted to protect a trade mark which the partnership was entitled to use, affect the conclusion I have drawn from the conduct of the parties as to the right to be registered as a proprietor.

It is appreciated that section 20(1) of the Partnership Act, 1890, may well affect many items that are not specifically referred to in the partnership agreement, but this provision cannot operate so as to defeat the true meaning of the agreement. It is clear from section 19 of the Act that the mutual rights of partners are to be determined in the first place by the terms of their agreement. Where these terms do not settle the matter, then reference may be made to the rules enunciated in the Act. On this subject, *Lindley* (12th Edition) at page 359 has these observations:—

"Agreement the test.

It is for the partners to determine by agreement amongst themselves what shall be the property of the firm, and what shall be the separate property of one or more of them. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with. Upon this subject there have been many decisions which will be alluded to hereafter, but the principal rules which may be deduced from the cases are now incorporated in sections 20 and 21 of the Partnership Act, 1890."

Here there was an express agreement and, although it does not deal expressly with the particular point, I have given my reasons for concluding that it does refer to this trade mark in terms, and in a context, which lead to the conclusion that this trade mark did not become the property of the firm. If I am wrong in concluding that the agreement disposes of the matter, the three considerations which the learned author proposes lead to the same conclusion. So far as the evidence is concerned, there is nothing to show that registration of this trade mark, to which the respondent alone was entitled prior to the agreement, was not obtained solely at his expense. A heavy onus lies on a litigant who claims to have a statutory register of this kind amended and, if evidence to the contrary existed, it would surely have been produced. The purpose for which registration was obtained, extends to a wider field than that in which the partnership was trading. Finally, the conduct of the parties in respect of the application for registration and the notice calling for objections shows that they have dealt with this trade mark, or at least conducted themselves in regard to it, in a manner which is inconsistent with it being partnership property.

For these reasons, in my judgment, the claim for rectification of the register was properly disallowed, and I would dismiss this appeal with costs.

Tan Ah Tah F.J. concurred.

Appeal dismissed.

Solicitors: *V. K. Palasuntharam; Lim, Lim & Oon.*

CHACKO & ORS. v. ARMY CIVIL SERVICES UNION

[O.C.J. (Kulasekaram J.) May 13, 1964]

[Singapore — Originating Summons No. 162 of 1963]

Trade Union — Stricking off of members for non-payment of levy — Levy imposed by executive council without prior secret ballot of members — Whether action of executive council ultra vires — Exhaustion of domestic remedies — Whether court will grant declaration if domestic remedies not exhausted.

The executive council of the Army Civil Services Union imposed a levy on members of the union. The plaintiffs were some of the members of the union who refused to pay the levy and they were subsequently struck off the register of membership of the union. They applied to court for an order that the executive council had no power to impose a levy upon the members of the union without a prior secret ballot of the members and that the levy imposed was wrongful, *ultra vires* and void. It was argued that as there was provision in the rules of the union for an appeal to the annual delegates conference, the plaintiffs had a domestic remedy which they should